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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 RCN CORPORATION,

12 Plaintiff,

13 v.

14 MICHAEL E. ALLRED, an individual,

15 Defendant.
16

CASE NO. 04-02645 PJH ARB

**RCN CORPORATION'S *EX PARTE*
APPLICATION FOR TEMPORARY
PROTECTIVE ORDER**

Judge: Honorable Phyllis J. Hamilton
Dept.: Courtroom 3
Date:
Time:

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18
19 **APPLICATION FOR TEMPORARY PROTECTIVE ORDER**

20 Pursuant to California Code of Civil Procedure sections 525, *et seq.*,¹ and Civil
21 Local Rule 7-10, plaintiff RCN Corporation ("RCN") hereby applies *ex parte* for a temporary
22 protective order prohibiting defendant Michael E. Allred ("Allred") from expending, transferring
23 or concealing any monies or assets pending the outcome of a hearing on RCN's motion for writ
24 of attachment. RCN's motion for writ of attachment currently is set to be heard by the Court on
25 September 8, 2004.
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27
28 ¹ RCN's underlying complaint for damages is before this Court based upon diversity jurisdiction.

1 This application is based upon the provisions of sections 525, *et seq.*, the
 2 following points and authorities and the declarations of Thomas Spike and Kelly T. Nugent in
 3 support of RCN's attachment motion and instant application, all submitted herewith.

4 **STATEMENT OF ISSUE TO BE DECIDED**

5 Whether, based upon Allred's admitted theft of \$724,424.56 from RCN and his
 6 obligation – but refusal – to make complete restitution for the outstanding balance of
 7 \$458,453.72, RCN is entitled to a temporary protective order prohibiting Allred from expending,
 8 transferring or concealing any monies or assets pending the outcome of a hearing on RCN's
 9 motion for writ of attachment.

10 **POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION**

11 **I. INTRODUCTION**

12 *Allred has admitted in writing that he stole \$724,424.56 from RCN*, and he has
 13 made restitution of only a portion of that amount – *he still owes RCN \$458,453.72 but refuses to*
 14 *pay*. On May 13, 2004, Allred received \$354,468.78. He informed RCN that he intends to use
 15 the funds for purposes other than restitution and that he has no other resources from which
 16 restitution may be made. *The \$354,468.78 Allred now possesses appears to be RCN's only*
 17 *hope for recovery.*

19 **II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

20 Allred, an individual formerly employed by RCN, is incarcerated in Pelican Bay
 21 Penitentiary for embezzling \$724,424.56 from RCN. From July 2001 to October 2003, Allred
 22 fraudulently converted 40 checks totaling \$724,424.56. (Declaration of Thomas Spike in support
 23 of attachment motion and TPO application ("Spike Decl."), submitted herewith.)

24 Allred was arrested, charged and sentenced, pleading guilty on March 9, 2004 to
 25 three counts of fraud. (Spike Decl., ¶ 4.) As part of a plea agreement, Allred provided a written
 26 statement admitting his theft of \$724,424.56 from RCN. (A true and correct copy of the Allred
 27 statement admitting his theft of \$724,424.56 from RCN. (A true and correct copy of the Allred
 28

admission statement is attached as Exhibit C to the Spike Decl.)

At sentencing, the court indicated that if Allred made restitution to RCN of Allred's available assets and cooperated fully with the authorities' ongoing investigation, his sentence might be reduced to two years. (Spike Decl., ¶ 4.) On March 15, 2004, as partial restitution, Allred conveyed to RCN the funds available to him at that time, which totaled \$265,970.84. *Id.* **Allred still owes RCN \$458,453.72.** *Id.*

RCN, on its own and by and through counsel, had several discussions with Allred's criminal counsel respecting further restitution. (Spike Decl., ¶ 5; Declaration of Kelly T. Nugent in support of attachment motion and TPO application ("Nugent Decl."), submitted herewith, ¶ 4.) Allred, by and through his criminal counsel, represented to RCN that Allred intended to sell his Pleasanton, California home – **which Allred purchased in whole or part with the funds stolen from RCN** –, that he expected to receive in excess of \$200,000 in equity from the sale, and that he would convey to RCN any such equity received from the sale. (Spike Decl., ¶ 5; Nugent Decl., ¶ 4.) RCN is informed and believes and thereon alleges that on May 13, 2004, the sale of Allred's home became final and Allred received \$354,468.78 in equity from the sale. (Spike Decl., ¶ 5; Nugent Decl., ¶ 4.)

On May 14, 2004, Allred, by and through his criminal counsel, informed RCN for the first time that Allred had outstanding tax liabilities in connection with the embezzled funds and that such liabilities totaled \$327,801, exclusive of interest and penalties. (Spike Decl., ¶ 5; Nugent Decl., ¶ 4.) Allred asserted that he could not make any further restitution to RCN from the proceeds received from the sale of his home. (Nugent Decl., ¶ 4.) He claims he has no other assets from which restitution may be effected in whole or in part. *Id.*

On June 30, 2004, RCN filed a complaint against Allred seeking damages for Allred's admitted fraudulent and criminal conduct. On July 13, 2004, a summons and the

1 complaint were sent to the Pelican Bay Litigation Coordinator for service on Allred.

2 On July 14, 2004, as part of RCN's earlier *ex parte* application for writ of
3 attachment previously considered by the Court, RCN posted a bond for the \$10,000 undertaking
4 required for attachment by Code section 489.210, *et seq.* The bond remains valid and effective.
5

6 **III. EX PARTE RELIEF IS APPROPRIATE**

7 Under California Code of Civil Procedure section 525, *et seq.*,² *ex parte* relief is
8 appropriate where great or irreparable injury will result to RCN before its attachment motion can
9 be heard. Cal. Civ. Proc. Code § 527(c)(1). Great or irreparable injury will result where, under
10 the circumstances of the case, it is understood or may be inferred that there is a danger the
11 property sought to be attached will be concealed or substantially impaired.
12

13 RCN seeks the instant TPO *ex parte* because of the very high likelihood that, prior
14 to the September 8 hearing on RCN's attachment motion, Allred will expend, transfer or secrete
15 away monies or assets which rightfully should be used to make RCN whole, the \$354,468.78
16 Allred recently received in particular. *Under his plea agreement with the criminal court, Allred*
17 *represented that he would make restitution to RCN and cooperate fully.* Notwithstanding, now
18 that he has been sentenced under the plea agreement, he informs RCN of his intention to make no
19 further restitution; he has stated his intention to use the \$354,468.78 for other purposes.
20

21 Allred claims he has no other assets or resources with which he may use to make
22 restitution. The \$354,468.78 in question represents the sole source from which RCN may hope
23 to recover any portion of the \$458,453.72 still owed by Allred. RCN will suffer great and
24 irreparable injury should Allred expend, transfer or secrete away the funds. A TPO prohibiting
25 same pending a hearing on RCN's attachment motion is therefore necessary and appropriate.
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28 ² Code of Civil Procedure section 527(c) is virtually identical to Rule 65(b) of the Federal Rules of Civil Procedure.

Given the above, there is more than adequate evidence supporting the Court's granting of the requested relief *ex parte*.

IV. RCN IS LIKELY TO PREVAIL ON ITS ATTACHMENT MOTION AND UNDERLYING COMPLAINT – ALLRED ADMITS STEALING FROM RCN AND HIS OBLIGATION TO MAKE RESTITUTION.

A. RCN is Entitled to Recover Against Allred Under the Express Terms of RCN's Criminal Conduct Policy, which Allred Agreed to in Writing and Subsequently Breached.

RCN has in place a "criminal conduct" corporate policy which expressly prohibits certain employee conduct. (A true and correct copy of the criminal conduct policy is attached as Exhibit A to the Spike Decl.) The RCN policy provides in pertinent part as follows: "No employee shall knowingly . . . engage in fraud or embezzlement affecting [RCN] property, funds, securities or other assets." Criminal Conduct Policy, Section B(3). The policy also states that "[n]o employee shall knowingly . . . remove property, materials or monies belonging to [RCN] . . . for personal gain [or] personal use. *Id.*"

On August 17, 2000, Allred consented in writing to be bound by RCN's criminal conduct policy. (A true and correct copy of Allred's signed consent form is attached as Exhibit B to the Spike Decl.) Allred admits breaching his agreement with RCN by committing fraud and embezzling \$724,424.56 from RCN and by concealing his fraudulent conduct.

B. RCN is Entitled to Recover Against Allred Based on its Conversion and Embezzlement Causes of Action.

Conversion is considered a breach of an implied contract to repay the party whose property was converted. *Klein v. Benaron* (1967) 247 Cal.App.2d 607, 610. Concerning RCN's embezzlement claim, embezzlement is a form of conversion and, therefore, also may be considered a breach of an implied contract to repay stolen monies. In addition, Civil Code section 2224 imposes on Allred duties of a constructive trustee with respect to the monies Allred stole from RCN. As such, the conversion and embezzlement causes of action are separate and

1 independent bases on which a writ of attachment may issue.

2 As described above, Allred admits that he knowingly and unlawfully converted 40
3 checks payable to RCN and thereby embezzled \$724,424.56. He admits using the monies for his
4 own personal gain and benefit.

5 For all the reasons set forth above, RCN is likely to prevail on its attachment
6 motion and underlying complaint against Allred.

7
8 **V. CONCLUSION**

9 RCN is virtually certain to obtain a judgment against Allred on RCN's underlying
10 complaint for damages and is likely to prevail on its attachment motion. Allred admits he stole
11 \$724,424.56 from RCN and he has already pled guilty and been sentenced on criminal charges
12 stemming from the thefts. Allred admits his obligation to make restitution to RCN but claims
13 lack of resources to make complete restitution, notwithstanding the fact that he recently received
14 \$354,468.78. RCN believes Allred may have secreted away other assets which could be used to
15 satisfy his restitutionary obligations to RCN.

16
17 RCN respectfully requests a temporary protective order prohibiting Allred from
18 expending, transferring or concealing any monies, the \$354,468.78 he received from the sale of
19 his Pleasanton home in particular, or assets pending the noticed hearing on RCN's motion for
20 writ of attachment.

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23 DATED: July 22, 2004

SEDGWICK DETERT, MORAN & ARNOLD LLP

24
25
26 By: 

RANDALL G. BLOCK
KEVIN HUGHEY

Attorneys for Plaintiff RCN Corporation